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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 807

RALPH GINZBURG, DOCUMENTARY BOOKS, INC., EROS MAGAZINE, INC., LIAISON NEWS LETTER, INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 338 F.2d 12. The opinion of the district court (JA 354a-368a)[1] is reported at 224 F.Supp. 129.

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[1] "JA" refers to the joint appendix prepared for the court of appeals.

JURISDICTION

The judgment of the court of appeals was entered on November 6, 1964. On November 27, 1964, Mr. Justice Brennan granted an extension of time to file a petition for a writ of certiorari to January 5, 1965. The petition was filed on January 4, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly found the materials at issue to be obscene.
2. Whether there were procedural defects affecting the judgment.

STATUTE INVOLVED

The pertinent portions of Section 1461 of Title 18 are set forth in the appendix to the petition at pages 10a-11a.

STATEMENT

Having waived trial by jury (JA 2a), petitioners were tried and convicted of violating 18 U.S.C. 1461. Petitioner Documentary Books, Inc., was convicted on six counts of having caused the mailing of an obscene book, namely *The Housewife's Handbook on Selective Promiscuity* (hereinafter called *The Handbook*), and three counts of having caused the mailing of advertisements telling where the book could be obtained. Petitioner Liaison News Letter, Inc., was convicted of six counts of having caused the mailing of an

obscene pamphlet, namely *Liaison*, Vol. 1, No. 1 (hereinafter called *Liaison*) and three counts of having caused the mailing of advertisements telling where the pamphlet could be obtained. Petitioner Eros Magazine Inc. was convicted of six counts of having caused the mailing of an obscene magazine, namely *Eros*, Vol. 1, No. 4 (hereinafter called *Eros*) and four counts of having caused the mailing of advertisements telling where the magazine could be obtained. Petitioner Ginzburg was convicted of all twenty-eight of the foregoing counts (JA 2a-3a, 6a-13a). Petitioner Eros Magazine, Inc., was fined a total of $5,000, and each of the other corporate petitioners a total of $4,500. Petitioner Ginzburg was fined a total of $28,000 ($1,000 on each count) and sentenced to a total of five years' imprisonment. Three years of his sentence was based upon counts involving *The Handbook* and two years upon counts involving *Eros* (JA 4a-5a).

The verdict of guilty was entered on June 14, 1963 (JA 2a).[2] On August 6, 1963, the court filed special findings of fact (JA 3a). The court found, as to *The Handbook*, that it is "a vivid, explicit and detailed account of a woman's sexual experiences * * * which goes substantially beyond customary limits of candor exceeding contemporary community standards in description and representation of the matters described therein" (# 5); that it is "patently offensive on its

[2] It was stipulated that petitioners caused the mailing of the three works and of the advertisements pertaining to them with knowledge of the contents of the works and the advertisements (JA 149a-150a).

face" (# 7); that it "appeals predominantly, taken as a whole, to prurient interest" (# 6); and that it "has not the slightest redeeming social, artistic or literary importance or value" (# 9). As to *Liaison*, the court found that it "primarily and as a whole is a shameful and morbid exploitation of sex published for the purpose of appealing to the prurient interest" (# 12); that it is "patently offensive on its face" (# 14) and "goes beyond customary limits of candor, exceeding contemporary standards in description and representation of the matters described therein" (# 11); and that it "has not the slightest redeeming social, artistic or literary importance or value" (# 13). As to *Eros*, the court found that "[w]hile portions * * * are taken from other works and may have literary merit in context," the magazine "appeals predominantly, taken [as] a whole, to prurient interest" (#16) and "has not the slightest redeeming social, artistic or literary importance or value taken as a whole" (# 19). In conclusion, the court found, as to all three works, that they "are devoid of theme or ideas" and "are all dirt for dirt's sake and dirt for money's sake" (JA 351a-353a).

Petitioners introduced various witnesses (a psychologist, a phychiatrist, a literary critic, an art critic, and a minister "trained and experienced in clinical psychology") who testified in general that the three works do not appeal to prurient interest (as they defined the term), have literary, artistic or scientific value, and do not go substantially beyond community standards. Additionally, they introduced books and magazines purchased at various newsstands to show

that they were more offensive than the works at issue, and offered testimony by the author of *The Handbook* as to its factual character, her purpose in writing it, and her own prior mailing of copies of it. The goverment introduced no evidence other than the material itself in its direct case, but offered three witnesses in rebuttal (see Pet. 5-12).

ARGUMENT

As shown by its special findings of facts, the trial court, in characterizing the three works here at issue as obscene, scrupulously sought to apply the test laid down by this Court for determining obscenity. *Roth* v. *United States*, 354 U.S. 476, 489; see, also, *Manual Enterprises, Inc.* v. *Day*, 370 U.S. 478, 482, 486 (Harlan and Stewart, JJ.); *Jacobellis* v. *Ohio*, 378 U.S. 18, 191-192 (Brennan and Goldberg, JJ.). The only question in this case, therefore, is whether the district court's ultimate finding, unanimously approved by the court of appeals, was a permissible one. See *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 190; *Manual Enterprises* v. *Day*, *supra*, 370 U.S. at 488; *Roth* v. *United States*, *supra*, 354 U.S. at 497 (Harlan, J., concurring in part, dissenting in part). The Court has the relevant works before it and if it deems that course appropriate, can re-examine the material for itself. See *Manual Enterprises* v. *Day*, *supra*, 370 U.S. at 488. Indeed, since no amount of argumentation could serve effectively as a substitute for such an examination, we confine ourselves to the proposition that the test applied by the courts below is

in full accord with the standards set forth by this Court.

1. The test adopted in *Roth* is "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest" (354 U.S. at 489). The courts below proceeded to answer this question. To give meaning to the term "prurient interest," they turned to the definitions which are set out in the *Roth* opinion (354 U.S. at 487, n. 20) and to the definitions of obscenity which appear in the cases which that opinion cites (354 U.S. at 489, n. 26).[3] In short, they treated the relevant question as whether the dominant theme and appeal of the book would be a morbid and shameful preoccupation with sex.[4] They understood that the trier of fact—judge or jury—must decide this question by reference to the general standards of the national community—not in terms of personal predilec-

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[3] *E.g., United States* v. *One Book Called "Ulysses"*, 5 F. Supp. 182, 184 (S.D.N.Y.); *Adams Theatre Co.* v. *Keenan*, 96 A.2d 519, 521, 12 N.J. 267 (S.Ct. N.J.); *Commonwealth* v. *Gordon*, 66 D.&C. 101, 136, 151 (Q.S., Phila. Cty. Pa.); *American Civil Liberties Union* v. *The City of Chicago*, 121 N.E.2d 585, 592, 3 Ill.2d 334 (S.Ct.Ill.); *Commonwealth* v. *Feigenbaum*, 70 A.2d 389, 390, 166 Pa.Super. 120 (Super.Ct., Pa.); *United States* v. *Levine*, 83 F.2d 156, 158 (C.A. 2); *Commonwealth* v. *Isenstadt*, 62 N.E.2d 840, 847 (S.Jud.Ct., Mass.).

[4] The district court found that the works herein appeal "to prurient interest of the average adult reader in a shameful and morbid manner" (#6, *The Handbook*, and #16, *Eros*) and "to prurient interest of the average individual" (#12, *Liaison*), and that they create "a sense of shock, disgust and shame in the average adult reader" (##8, 15 and 18) (JA 352-353a).

tions—and that a work can not be considered obscene unless it goes substantially beyond contemporary standards of permissible candor.

In applying this test, the courts also understood and acted upon the proposition that the ultimate issue of obscenity concerns the overall theme of the work. They looked to the intended impact of the material taken as a whole, using the word "intent" in the sense that it is used to refer to the intent of a statute. There is no suggestion that they believed that their task was to balance the social importance of the work against the degree of prurient appeal and then decide whether the work's importance was sufficient to justify its erotic passages. Regardless of the work's lack of social importance, the courts realized that its dissemination was forbidden only if an appeal to the prurient interest was its dominant theme.

It is true that there was opinion evidence offered by petitioners' witnesses intended to show that the works did not go substantially beyond contemporary standards of candor, and that they had some social importance. However, the ultimate determination of obscenity, as the courts below held, must be made by the courts and not by expert witnesses. Cf. *United States* v. *Kennerley*, 209 Fed. 119, 121 (S.D. N.Y., Judge Learned Hand). With regard to community standards, the most that has ever been claimed is that a defendant has a right to "enlighten" the trier of facts as to community standards. See *Smith* v. *California*, 361 U.S. 147, 165 (Frankfurter, J. concurring), 172 (Harlan, J. concurring). It has never been held that the trier is bound by the partic-

ular evidence offered. See *Kahm* v. *United States*, 300 F. 2d 78 (C.A. 5), certiorari denied, 369 U.S. 859. Similarly, defendant's introduction of opinion testimony cannot establish conclusively that a work has any redeeming literary or scientific theme. On both issues the courts below specifically rejected the witnesses' opinions after considering both the expert testimony and the works themselves.

In this Court, the petitioners urge particularly that *Eros* and *The Handbook* were not wholly devoid of literary and scientific merit. As we have indicated above, this issue can only be decided by the court's consideration of the works themselves. We note only that even if works have, to some comparatively slight extent, a literary or scientific interest, this does not, in our view, immunize them from attack as obscene. There are few works so flooded in every last line and detail with prurient appeal that no claim can be made that they appeal, at least interstitially, to some other interest. The very reference in *Roth* to the "dominant" theme of the work indicates a recognition that there may be minor or subservient themes which do not immunize from prosecution a patent attempt to appeal to the prurient interest of readers. It is only if the presence of other themes casts doubt upon the dominance of prurience as the intended appeal and overriding interest of the work that the publication is constitutionally protected. Where the predominant theme is a patently offensive appeal to an unwholesome and shameful preoccupation with sex, the work is obscene even if it may also be of

some comparatively slight literary or scientific interest.

Finally, there is little to be gained by petitioners' suggestion that the concept "hard-core" pornography should be substituted for that of obscenity as the relevant constitutional test (Pet. 15-16). A change in labels would not make the underlying issues of policy more malleable. *Jacobellis* v. *Ohio*, *supra*, 378 U.S. at 201 (Warren, C.J. dissenting). For example *Zeitlin* v. *Arnebergh*, 383 P. 2d 152, 59 Cal. 2d 901, 31 Cal. Rptr. 800, which petitioners cite (Pet. 15), does hold that only hard-core pornography can be reached constitutionally by obscenity statutes. 383 P. 2d at 160-162. But, under its use of that term, material which would be obscene under the *Roth* test, as we understand it, would also meet the definition of hard-core pornography. *Id.* at 163. As for petitioners' suggestion of unconstitutional vagueness, this Court held in *Roth* that where the relevant statutes are applied in accordance with the test there enunciated, they are constitutionally precise. 354 U.S. at 491-492. We see no compelling reason for reconsideration of the established test or any need for plenary review of an *ad hoc* determination in which all of the judges below have concurred.

2. Petitioners' claims of procedural errors at the trial were properly rejected by the court of appeals.

a. Petitioners' complaint concerning the trial court's delay in making special findings is, as the court of appeals stated (Pet. App. 7a), without substance. Essentially the only "finding" that can be made is that the works are obscene under the rele-

vant test. Having made this finding of ultimate fact or law in its general verdict, the court was free to take some time to make explicit the particular basis of its general ruling.

b. Irrelevant evidence can, of course, be admitted in a trial without a jury, as long as the court does not base its decision upon it. The purpose of the relevancy rule is to prevent confusion to jurors. See *Shepard* v. *United States*, 290 U.S. 96, 104; 1 *Wigmore on Evidence*, § 28, pp. 409-410 (3d ed. 1940). There was thus no reason to reverse the decision of the district court simply because it heard irrelevant testimony concerning the effect of the challenged material upon adolescents, introduced in rebuttal of the petitioners' evidence of the therapeutic uses of this material. Unlike *Volanski* v. *United States*, 246 F. 2d 842 (C.A. 6), it is entirely clear from reading the trial court's findings and opinion here that it based its judgment solely upon application of the *Roth* test, and that the effect of the challenged material upon adolescents was something which the court noted only by way of explanation of its rejection of the tendered defense of *The Handbook* as therapeutic (JA 366a; 224 F. Supp. at 136).

c. "Scienter" in an obscenity prosecution is established upon a showing that the accused had knowledge or notice of the contents of the challenged work. *Rosen* v. *United States*, 161 U.S. 29, 41-42; *Price* v. *United States*, 165 U.S. 311; *Roth* v. *United States*, *supra*, 354 U.S. at 491, n. 28; *Kahm* v. *United States*, *supra*, 300 F. 2d at 86; *United States* v. *Oakley*, 290 F. 2d 517, 519 (C.A. 6), certiorari denied, 368

U.S. 888. It was stipulated that all of the petitioners knew the contents of the works here at issue. Accordingly, there is no need to consider whether additional evidence of intent is shown by petitioners' efforts to mail their material from selected post offices (*i.e.*, at Blue Ball, Pa.; Intercourse, Pa.; and Middlesex, N.J.). Moreover there is no basis in the trial court's findings for a contention that commercial exploitation was considered an element of the obscenity of any of the challenged works.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
Attorneys.

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